Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.	))))))))))))	WT Docket No. 11-65 File Nos. 0004669383, *et al.*

NEW JERSEY DIVISION OF RATE COUNSEL
REPLY TO OPPOSITION

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EXECUTIVE SUMMARY

The response of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. ("Applicants"), albeit voluminous, fails to address the position of the New Jersey Division of Rate Counsel ("Rate Counsel") that the proposed transaction is not in the public interest. The alleged merger efficiencies associated with the transaction do not justify the consequence of undermining competition, which indisputably would harm consumers.

Rate Counsel certainly welcomes fewer blocked and dropped wireless calls, more widespread deployment of long term evolution ("LTE") technology throughout the country, and prudent use of spectrum (a public good), but the societal cost of achieving these promised benefits through the proposed merger is too great to ignore.

The Applicants' premise that the wireless market is sufficiently competitive to cause post-merger AT&T Inc. ("AT&T") to flow through merger synergies to consumers and to lower rates (and raise service quality) based on an anticipated reduced marginal cost of supply is implausible. Therefore the theoretical benefits that the Applicants describe are simply niceties and ultimately meaningless.

Furthermore, the Applicants seem to seek to frame the dispute as to the merits of the proposed transaction as one that exists primarily between them and other wireless carriers,[1] and, by so doing, conveniently sidestep or minimize the concerns that consumers raise.[2] However, in

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[1] / Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, June 10, 2011 ("Joint Opposition"), at 4; Reply Declaration of Dennis W. Carlton, Allan L. Shampine and Hal S. Sider ("Carlton/Shampine/Sider Reply Declaration"), at para. 2.

[2] / *See, e.g.,* Rate Counsel; New Media Rights, Utility Consumers' Action Network, and Privacy Rights Clearinghouse; Greenlining Institute; Free Press; Public Knowledge and the Future of Music Coalition. See, also,

considering the merits of the proposed transaction, the Federal Communications Commission ("FCC" or "Commission") should recognize that the *possibility* of short-term gains for consumers (such as the theoretical, unspecified rate reductions to which the Applicants repeatedly refer and the promise of purportedly accelerated LTE deployment in rural areas) do not justify the *probability* of long-term, irrevocable harm to consumers that the unprecedented market concentration would pose. In any event, the Applicants have failed to meet their burden of proof. Therefore the FCC should deny the application of AT&T to acquire T-Mobile USA's ("T-Mobile's) assets and operations from Deutsche Telekom AG ("Deutsche Telekom") because the proposed transaction is not in the public interest.

Ex parte letter from Charles Acquard, Executive Director, National Association of State Utility Consumer Advocates, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: WT Docket No. 11-65 AT&T/Deutsche Telekom Application for Transfer of Control of T-Mobile Licenses, June 7, 2011.

Before the
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In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and its Subsidiaries to AT&T Inc.	))))))))))))	WT Docket No. 11-65 File Nos. 0004669383, *et al.*

NEW JERSEY DIVISION OF RATE COUNSEL
REPLY TO OPPOSITION

I. INTRODUCTION

Rate Counsel submits this reply to the opposition submitted by the Applicants ("Joint Opposition").[3] The Applicants fail to address adequately the concerns Rate Counsel described in its Petition to Deny ("Rate Counsel Petition"). The FCC should grant Rate Counsel's Petition and deny the Application.

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3 / Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, June 10, 2011 ("Joint Opposition"). The Joint Opposition includes twelve declarations. Also on June 10, 2011, the Applicants submitted partial responses to the FCC's Information Request. Rate Counsel has not yet had the opportunity to review the confidential versions of these responses, and may supplement its response based on such a review.

Furthermore, the Applicants seem to seek to frame the dispute as to the merits of the proposed transaction as one that exists primarily between them and other wireless carriers.[4] By so doing, the Applicants conveniently sidestep the concerns that consumers have raised.[5] The *possibility* of short-term gains for consumers (such as the theoretical, unspecified rate reductions to which the Applicants repeatedly refer, the purportedly faster roll-out of LTE in rural areas, and the promise of increased service quality) do not justify the *probability* of long-term, irrevocable harm to consumers that the unprecedented market concentration would pose

II. REPLY TO OPPOSITION

A. Long Term Evolution Deployment

AT&T states, with reference to the Obama administration's and National Broadband Plan's broadband availability goals: "Because of the spectrum, scale, and other resources resulting from this transaction, AT&T commits that, consistent with those critical national priorities, it will deploy LTE within six years after closing to over 97 percent of Americans – *55 million* more Americans than AT&T's pre-merger plans."[6] AT&T states that the plan includes

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[4] / Joint Opposition, at 4.

[5] / *See, e.g.,* Rate Counsel; New Media Rights, Utility Consumers' Action Network, and Privacy Rights Clearinghouse; Greenlining Institute; Free Press; Public Knowledge and the Future of Music Coalition. See, also, *Ex parte* letter from Charles Acquard, Executive Director, National Association of State Utility Consumer Advocates, to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: WT Docket No. 11-65 AT&T/Deutsche Telekom Application for Transfer of Control of T-Mobile Licenses, June 7, 2011. In addition, thousands of individual comments were submitted to the FCC, many of which were from consumers opposing the proposed transaction.

[6] / Joint Opposition, at 75 (emphasis in original).

"many rural areas"[7] and "underserved communities" but AT&T does not state how many of the 20 million unserved will be served.[8] The LTE deployment purportedly would be increased from any AT&T plans pre-merger by approximately one million square miles (from less than 20% of the land mass of the United States to 55% of the land mass).[9] AT&T provides no public, interim commitments and six years is light years in the technology world. For example, as of June 30, 2005 only 42.9 million high-speed lines were in service in the United States[10] (and the mobile wireless data market was in its infancy). By the time some areas see LTE deployment, the technology may be outdated.

Rate Counsel stated in its Petition to Deny that AT&T has failed to provide evidence that it could not (or would not) extend LTE coverage nor narrow the urban/rural digital divide without the transaction.[11] The Applicants' Opposition fails to provide any additional evidence that alters Rate Counsel's conclusion that the transaction will not alter the cost/benefit analysis of deploying LTE to rural areas: "If AT&T lacks the economic incentive to serve unserved areas today, post-merger, when it is under pressure to achieve $39 billion in merger synergies, it is actually far less likely to find it profitable to serve these areas."[12] The additional $8 billion of capital investment (which also includes the integration of AT&T and T-Mobile USA's networks)

7/ *Id.*

8/ *Id.*, at 76.

9/ *Id.* AT&T had purportedly concluded pre-transaction that it could only reach 90% of the U.S. population with LTE. Reply Declaration of William Hogg ("Hogg Reply Declaration"), at para. 24.

10/ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2005* ("2005 High-Speed Services Report), April 2006, at 2.

11/ Rate Counsel Petition to Deny, at 13-14.

12/ *Id.*, at 14, citing AT&T Public Interest Statement, at 51; Declaration of Rick L. Moore ("Moore Declaration"), at para. 32.

cited by the Applicants[13] is negligible when compared to the to the total of $39 billion associated with the transaction and the investments it describes over the past several years.[14] Rate Counsel continues to urge the Commission to reject the Application and not be swayed by unenforceable generalities and promises.

AT&T has responded to the Commission's Information Request regarding AT&T's plans for LTE deployment.[15] Rate Counsel has not received the proprietary responses to the FCC discovery requests, which hinders a more complete reply. Echoing previous statements in its Application and in its Joint Opposition, AT&T responds to the FCC's request for a detailed description of AT&T's calculation that the merged company could reach 97.3% of the population with its LTE deployment (Request #31), and states:

> The transaction changes the calculus for LTE deployment in important respects. It gives AT&T the scale, scope, and resources that collectively enable it to increase its LTE deployment from 80 to 97 percent coverage of the U.S. population. The merger will provide AT&T with additional AWS spectrum that can be used for LTE. That additional spectrum will enable AT&T to fill in holes where AT&T either has thin 700 MHz and AWS spectrum holdings or lacks such spectrum at all.[16]

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13 / Joint Opposition, at 84. *See, also*, AT&T Press Release, "AT&T to Acquire T-Mobile USA from Deutsche Telekom," March 20, 2011, stating: "The acquisition will increase AT&T's infrastructure investment in the U.S. by more than $8 billion over seven years. Expansion of AT&T's 4G LTE network is an important foundation for the next wave of innovation and growth in mobile broadband, ensuring the U.S. continues to lead the world in wireless technology and availability."

14 / *See, e.g.*, Joint Opposition, at 37, wherein it is stated: "Over the past four years, AT&T has invested more than $75 billion to upgrade and maintain its wireline and wireless networks—more than any other public company has invested in the United States. During that same period, AT&T spent an additional $23 billion on spectrum on spectrum purchases and company acquisitions to expand its wireless network footprint and enhance network performance." (cites omitted) In the years 2008 through 2010, AT&T invested approximately $33 billion in spectrum and upgrading its wireless network. *Id.*, at 37-38. AT&T's capital expenditures in 2010 were $9.17 billion. *Id.*, at 38.

15 / Rate Counsel has not yet reviewed the confidential version of this response.

16 / AT&T Response to FCC Information Request #31a.

AT&T provided the Commission with spreadsheets detailing the planned rollout of LTE by area, state, and county absent the proposed transaction and if the transaction goes forward.[17] AT&T indicates that the spreadsheets include the launch dates for each area, but also states: "Because AT&T is in the *very early stages of planning* its LTE deployment if the Proposed Transaction is consummated, the specific dates of coverage have not yet been determined."[18]

AT&T's acknowledgement of the precariousness of the commitment should be front and center as the Commission examines whether the proposed transaction is in the public interest. Much of the support for the acquisition of T-Mobile by AT&T is related to the prospect of additional mobile broadband deployment.[19] Rate Counsel does not deny that the benefits of additional broadband deployment are immense,[20] having advocated for measures to increase broadband deployment for many years now. However, Rate Counsel is skeptical that the deployment would not occur but for the merger.[21] Furthermore, the purported expanded wireless broadband deployment is speculative at this point and much of the LTE deployment is in areas that already have access to broadband and mobile broadband. The FCC should examine how much of the LTE deployment will be in unserved areas. As noted by another commenter,

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[17] / AT&T Response to FCC Information Request #31, Exhibit 31-1. Rate Counsel has not reviewed the confidential Exhibit.

[18] / AT&T response to FCC Information Request #31a (emphasis added). In response to #31b, AT&T provides a list of counties where AT&T does not currently provide wireless data service (or provides the service to less than 5% of the county's population). In #31c, the FCC requests information related to how the proposed transaction would affect the provision of wireless data services in counties that current *do not* have any wireless data service today. AT&T has also provided documents related to this topic in its production of documents to the FCC.

[19] / *See, e.g.*, NAACP; at 1; Nevada Governor Brian Sandoval, at 1; Montana Farmer's Union, at 1; American Federation of Teachers, at 1; Dr. Daniel H. Jara, President & CEO, Statewide Hispanic Chamber of Commerce of New Jersey, at 1; Wisconsin Women's Business Initiative, at 1; Economic Development Association of Alabama, at 1; and Richard Thompson, Speaker, West Virginia House of Delegates, at 1. See, also, Joint Opposition, at 1-2.

[20] / *See, e.g.*, Joint Opposition, at 77-80.

[21] / *See id.*, at fn 89; Free Press, at 41-42; American Antitrust Institute, at 23-24.

AT&T's wireless coverage already covers 97% of the US population before the proposed transaction.[22] The FCC's assessment of benefits must consider whether there are "verifiable, transaction-specific public interest benefits."[23]

AT&T states that its promised LTE deployment "is an especially significant public interest benefit that weighs heavily in favor of the merger."[24] Yet, AT&T cites prior FCC merger approvals in which the FCC found Applicant commitments would increase broadband deployment.[25] These commitments were more detailed. AT&T provides very little information about the services it would actually offer (as a result of the LTE deployment), the pricing of those services, or a public commitment as to a timeline for rollout.

The FCC's finding in the AT&T/BellSouth Merger Order, for example, was that "consumers will benefit from the deployment of broadband in the merged entity's territory more rapidly than might otherwise have occurred absent the merger."[26] AT&T has failed to make such a showing here. Furthermore, the commitments that AT&T made in the AT&T/BellSouth

[22] / Sprint, at fn 409, citing AT&T Press Release, "AT&T Sets the Record Straight on Verizon Ads," and generally, Sprint, at 24-25.

[23] / *In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manger and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.*, and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, File No. ISP-PDR-20080613-00012, *Memorandum Opinion and Order and Declaratory Ruling* (rel. November 10, 2008) ("Verizon/AllTel Order"), at para. 114. *See also, id.*, at para. 117, which states that "[b]ecause much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit."

[24] / Joint Opposition, at 76 (cites omitted).

[25] / *Id.*, citing *Verizon/AllTel Order,* at paras. 122-146, 196-201; *In the Matter of Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, *Memorandum Opinion and Order* ("Frontier/Verizon Order"), rel. May 21, 2010, at paras. 50, 52, Appdx. C, D; *In the Matter of AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and* Order, rel. March 26, 2007 ("AT&T/BellSouth Order"), at para. 204, Appdx. F.

[26] / *AT&T/BellSouth Order*, at para. 204 (cites omitted).

transaction addressed accessibility issues, including specific commitments regarding free equipment; special pricing ($10/month); and unbundling of service components (i.e. "naked" DSL).[27]

In the Frontier/Verizon proceeding, the Commission concluded that Frontier's commitments were "verifiable and enforceable"[28] and allowed the "Commission enforcement action if they are not met."[29] The commitments by Frontier included guarantees as to the speed service offered; annual milestones; and significant detailed reporting to the Wireline Competition Bureau.[30]

In the Verizon/AllTel proceeding, to which AT&T refers, the FCC concluded of the various promises Verizon made regarding network upgrades and deployment: "While we find that this transaction is likely to result in transaction-specific public interest benefits, we are not able on the basis of this record, using the sliding-scale approach described above, to conclude that they are sufficiently large or imminent to outweigh the potential harms we have identified in certain individual markets. In those markets, therefore, remedies are necessary to ameliorate likely competitive harms."[31] The FCC also concluded:

> The proposed transaction constitutes a merger of the largest wireless company in the United States, based on revenues, as well as the number of retail customers, with another wireless company that is the largest recipient of the high-cost competitive ETC support. Such unique facts and large scope of this transaction compel us to condition our approval of the proposed transaction on Verizon Wireless's commitment to phase down its competitive ETC high cost support

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[27] / *Id.*, Appendix F, at pp. 147-148 and 153.

[28] / *Frontier/Verizon Order*, at para. 52.

[29] / *Id.*, at para. 53.

[30] / *Id.*, Appendix 6, at Commitments 1-6.

[31] / *Verizon/AllTel Order*, at para. 156.

> over five years, as discussed herein. In light of Verizon Wireless's voluntary commitment, we decline to impose a condition that, prior to receipt of such funding, Verizon Wireless demonstrate costs of providing universal service. We find that Verizon Wireless's voluntary commitment to phase down competitive ETC high cost support over five years is sufficient to relieve commenters' concerns. We also note that the Commission is currently considering this issue, along with others, in a rulemaking on comprehensive high-cost universal service reform.[32]

AT&T claims that its LTE deployment will be funded with private capital, not with any universal service funds or other public funds.[33]

In balancing the potential benefits and harms of the proposed transaction, the FCC should afford no weight to AT&T's general promise to deploy LTE more extensively over a six-year period than it might otherwise have done.

B. Spectrum

The Applicants state that "AT&T has pursued all reasonable measures at its disposal to address its spectrum and capacity constraints."[34] The Applicants' arguments on this point are not persuasive, and lack any comprehensive cost-benefit analysis of alternatives.[35]. The Applicants have failed to demonstrate that they have pursued adequately other alternatives to prepare for AT&T's migration to LTE. Among other things, AT&T has not provided information on the cost and savings associated with developing and deploying dual-capable handsets to

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32 / *Verizon/AllTel Order*, at para. 197 (cites omitted).

33 / Joint Opposition, at 76.

34 / *Id.*, at 63.

35 / *See, e.g.*, *id.*, at 65-66, 74.

accommodate AT&T's migration from older to newer technology. AT&T clearly has substantial experience with handset promotions.[36]

AT&T states that "AT&T would have to install the necessary equipment, change antennas throughout its footprint to support the 700 MHz and AWS spectrum, and replace the handsets of AT&T's customer base, a process that would be costly and time-consuming and could not be accomplished in time to address AT&T's spectrum and capacity constraints."[37] Yet clearly the acquisition and integration of T-Mobile would be "costly and time-consuming."[38] However, AT&T has failed to provide detailed cost-benefit analyses of its various options for addressing spectrum challenges.

The declarants have failed to provide any cost-benefit analyses of the alternative of deploying dual-functioning handsets to replace the embedded base rather than waiting until "new and renewing subscribers obtained new handsets that access the newly equipped spectrum."[39] The Applicants have failed to demonstrate that they have "chosen the more efficient path."[40]

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36 / *See, e.g.*, Carlton/Shampine/Sider Reply Declaration, at para. 96, Reply Declaration of David Christopher ("Christopher Reply Declaration"), at paras. 9-11.

37 / Hogg Reply Declaration, at para. 12. Another declaration similarly asserts that "it is difficult and time-consuming to reallocate [spectrum] to higher valued uses due to a carrier's need to continue to provide services to subscribers with handsets designed to access technology deployed on these spectrum bands." Carlton/Shampine/Sider Reply Declaration, at para. 16.

38 / AT&T would acquire T-Mobile from Deutsche Telekom for $39 billion. AT&T press release "AT&T to acquire T-Mobile USA from Deutsche Telekom," March 20, 2011.

39 / Carlton/Shampine/Sider Reply Declaration, at para. 17.

40 / *Id.*

C. Competition

The level of concentration that the proposed transaction would yield raises the stakes of this proceeding, and means that the FCC's scrutiny should be that much greater.

According to the Applicants, "even highly concentrated markets can be highly competitive."[41] Rate Counsel does not deny this theoretical possibility. Similarly, the Applicants seek to minimize the significance of the emerging duopoly.[42] However, the Applicants fail to demonstrate why the proposed level of significant concentration that the proposed transaction contemplates should not raise the bar for regulatory review. The Applicants have failed to demonstrate that relevant markets would be "highly competitive."

The Applicants repeat their reliance on regional and all-you-can-eat ("AYCE") carriers as evidence of competition.[43] The fact that some carriers have a toehold in some markets does not demonstrate robust nationwide competition.[44]

Rate reductions are simply theoretical and should be afforded no weight.

The Applicants have failed to demonstrate that the projected $39 billion in merger-related synergies will benefit consumers. Applicants repeatedly refer to the proposed merger's creation of incentives to increase output and lower prices,[45] but their descriptions of the purported

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41 / Reply Declaration of Robert D. Willig, Jonathan M. Orszag and Jay Ezrielev ("Willig/Orszag/Ezrielev Reply Declaration"), at para. 3.

42 / *See, e.g.,* Joint Opposition, at 93-105.

43 / *See, e.g., id.*, at 105-114; Christopher Reply Declaration, at paras. 3, 35-38.

44 / *See* Rate Counsel Petition, at 25, Table 2, showing the small market shares of the non-national wireless providers.

45 / *See, e.g.,* Joint Opposition, at 69 (absent the merger, AT&T contends it would "pursue an inefficient strategy that would cause consumers to pay more and suffer from worse service quality"; Joint Opposition, at 219 (the transaction "will therefore produce lower prices than would prevail in the absence of the transaction"); Joint Opposition at 217-219, citing, among others, Rate Counsel; Willig/Orszag/Ezrielev Reply Declaration, at para. 6

consumer benefits do not progress beyond theoretical observations, and entirely lack any quantification of the implied promise of rate reductions. Without cost data,[46] these speculative reductions are meaningless at various levels – the Applicants have made no commitment to flow through the synergies and the benefit of increased output to consumers. Furthermore, without cost data, the FCC cannot ascertain that the unspecified post-merger rates are those that would prevail in a competitive market. Even if AT&T's wireless rates were to decline, as Rate Counsel explained in its Petition,[47] a reduction from one supracompetitive rate level to a slightly lower supracompetitive rate level could still be consistent with the pricing behavior of a monopolist. Therefore the FCC should not be persuaded by window-dressing promises of lower rates.

Similarly, the FCC should discount arguments that "the net effect of the transaction could still be to lower market prices for wireless services and to make consumers better off, not worse off."[48] The Applicants have provided negligible evidence that post-merger, they actually would flow through synergy savings to consumers. The FCC should not confuse the Applicants' discussions of theoretical benefits for consumers with real benefits. In the absence of effective competition, the theoretical promise of "lower" prices may never see the light of day.[49]

("incentives to expand output and lower prices"); Carlton/Shampine/Sider Reply Declaration, at paras. 9, and 24 (the proposed transaction will "reduce the marginal cost of operating at any given level of output").

[46] / Interestingly, the Applicants provide some limited cost data about Sprint, their rival, but the Application is generally devoid of cost data regarding their own provision of service. Willig/Orszag/Ezrielev Reply Declaration, at para. 75. In order to assess the reasonableness of rates, the FCC requires thorough, documented cost data. Simply taking on faith that the wireless industry is competitive is no longer a plausible or responsible approach to regulation of the increasingly concentrated wireless industry.

[47] / Rate Counsel Petition, at 39.

[48] / Willig/Orszag/Ezrielev Reply Declaration, at para. 105.

[49] / *See also, id.*, at para. 117, which implies that the Applicants are concerned about consumers – in the absence of any concrete cost data and rate reduction commitments, purported benefits for consumers should be afforded little weight. Of course Rate Counsel welcomes consumer benefits but urges the Commission to examine skeptically Applicants' arguments that seek to portray the merger as pro-consumer, and to portray opposition to the

Rate Counsel does not disagree with Applicants' assertion that the government should not interfere with efficiencies "*in order to make it easier for others to compete,*"[50] but the transaction would create additional opportunities and incentives for AT&T to engage in anticompetitive behavior as Rate Counsel has noted. Furthermore, Applicants ultimately bear the burden to demonstrate that AT&T would actually set wireless prices close to marginal cost (as opposed to simply increasing its profits). Similarly, the Applicants' claim that one should consider "quality-adjusted prices"[51] may have theoretical appeal, but without comprehensive cost data regarding AT&T's wireless services, such generalities carry little weight. The Applicants should provide comprehensive marginal cost data.[52] Absent such data, the FCC cannot ascertain whether rates are at the levels that would exist in an efficiently competitive market. Furthermore, at a more global level, the Applicants have failed to demonstrate that the proposed transaction is the most cost-effective way for each of the Applicants to solve their capacity constraints.

If lower wireless rates are to be viewed as evidence of a competitive market, then so too should higher wireline rates be viewed as evidence of a noncompetitive market.

The Applicants rely on wireless rate reductions as evidence of competition.[53] By this logic, wherever AT&T has raised its wireline rates, one could reasonably deduce that markets are

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merger as stemming largely from the industry. Broad-brushed promises of consumer benefits that, according to the Applicants' rationale rely substantially on the Applicants' misguided premise of a competitive industry, in no way justify the proposed transaction.

50 / Joint Opposition, at 99 (emphasis in original).

51 / Carlton/Shampine/Sider Reply Declaration, at para. 72.

52 / *Id.*, at paras. 76-80.

53 / *See, e.g.*, Joint Opposition, at 218-219.

not competitive. Indeed, a detailed report completed in California for the Rules Committee of the California State Senate stated:

> A central premise for embarking on deregulation is that competition tends to keep prices down. So far, however, PUC data show that prices have gone up.
>
> At the request of the oversight office, the PUC gathered information on landline rate changes levied by California's four incumbent telephone carriers since their prices were deregulated in September 2006. The data show that some rates increased by several hundred percent. Moreover, these increases by AT&T, Verizon, Frontier and SureWest were all implemented on limited notice and with no formal opportunity for protest or comment by the public.[54]

The short term benefits of few dropped and blocked calls do not justify the unwarranted level of concentration that would result from the proposed transaction.

Applicants and multiple declarants on behalf of the Applicants repeatedly extol the purported benefits to consumers (such as fewer blocked calls, fewer dropped calls, and the possibility of rate reductions).[55] Perhaps AT&T's and T-Mobile's consumers could benefit in the short term, but the Applicants fail to demonstrate that these speculative short-term benefits do not outweigh the substantial long-term harm to consumers that would result from the proposed significant structural change to the wireless market.

The promises in the Application are simply promises. The synergies are likely to benefit shareholders. However, the wireless market is not sufficiently competitive to cause AT&T to flow through savings to consumers

[54] / "California Public Utilities Commission: Gaps Emerge in Telephone Consumer Protections," California Senate Office of Oversight and Outcomes, John Adkisson, John Hill, Dorothy Korber, Nancy Vogel (a report prepared for the Rules Committee of the California State Senate), July 16, 2010, at 12.

[55] / *See, e.g.*, Joint Opposition, at 19-83; Carlton/Shampine/Sider Reply Declaration, at paras. 37-38; Hogg Reply Declaration, at paras. 36-37.

D. Special Access

Contrary to the Applicants' assertion, neither existing levels of competition nor the existing regulatory framework prevent AT&T from implementing anticompetitive increases in rivals' backhaul costs.

Applicants seek to minimize the impact of the merger on special access markets,[56] and also rely on existing regulation of special access markets to prevent supracompetitive pricing.[57] Existing regulation fails to yield supracompetitive pricing, as is demonstrated by the substantial and excessive rates of return earned by AT&T.[58]

Among other things, in responding to Rate Counsel's and others' concerns about the merger's effect on AT&T's ability to raise rates of backhaul services, the Applicants rely on the Commission's rate regulation of AT&T "in areas where it does not face effective competition."[59] AT&T contends that the market constrains prices where competition exists and the FCC's rate regulation works where there is no competition. For example, David Mayo, Senior Vice President of Technology Strategy, Finance and Development for T-Mobile USA, Inc., states that: "it has been T-Mobile USA's experience that there is now choice for obtaining high capacity backhaul services in and around the most populated areas of the United States."[60] Neither

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56 / *See, e.g.*, Joint Opposition, at 162-178; Willig/Orszag/Ezrielev Reply Declaration, at para. 19, citing, among others, Rate Counsel Petition; Declaration of Parley Casto ("Casto Declaration"), at para. 4, asserting that "AT&T has faced competition for years in the provision of dedicated connections to wireless cell sites."

57 / *See, e.g.*, Joint Opposition, at 173, Willig/Orszag/Ezrielev Reply Declaration, at para. 86. Carlton/Shampine/Sider Reply Declaration, at paras. 113 and 120, relying on the fact that AT&T's special access services are subject to the Commission's regulation.

58 / *See, e.g.*, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Reply Comments of the New Jersey Division of Rate Counsel, February 24, 2010 ("Rate Counsel 2010 Special Access Comments"), at 21-22.

59 / Willig/Orszag/Ezrielev Reply Declaration, at para. 18.

60 / Declaration of David A. Mayo ("Mayo Declaration"), at para. 9.

"choice" nor "the most populated areas" are defined. His declaration is hardly persuasive. In contrast, the record in WC Docket No. 05-25 amply shows that under the FCC's current regulatory framework, AT&T and other incumbent local exchange carriers are earning supracompetitive profits.[61]

Applicants contend that wireless carriers increasingly are relying on Ethernet, which, according to them is competitively supplied.[62] However, Applicants have failed to demonstrate that Ethernet is ubiquitously offered, and Rate Counsel is not persuaded that in all geographic markets Ethernet is a competitive service. In less dense areas, and in situations where wireless carriers' back-haul demand is not significant, it is highly unlikely that either Ethernet or TDM special access services are competitively supplied. Furthermore, T-Mobile purchases Ethernet service from other parties, and this merger could impact the ability of other parties to continue to compete as a result of the loss of T-Mobile as a customer.

Statements such as "the industry is increasingly moving away from legacy time division multiplexing ('TDM') DS1s and DS3s to higher capacity alternatives, such as fiber and microwave Ethernet services,"[63] lack any grounding in specificity relative to relevant geographic markets. Furthermore, backhaul demand varies by wireless site, and so not all sites are created equal.[64] The backhaul quantity demanded affects the likelihood of competitive supply, and the Applicants have certainly failed to provide the data that would allow the FCC to determine that

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61 / Rate Counsel 2010 Special Access Comments, at 21-22.

62 / Willig/Orszag/Ezrielev Reply Declaration, at paras. 88-89.

63 / *Id.*, at para. 88, citing Casto Declaration, at paras. 2, 5-9.

64 / Willig/Orszag/Ezrielev Reply Declaration, at para. 94. *See also, id.*, at para. 97 (cite omitted) stating among other things, "US Cellular uses microwave backhaul to connect to more than 33% of its cell sites." The possible presence of some alternatives in certain locations does not alter the lack of sufficient economic substitutes for ILECs' special access services elsewhere.

backhaul is competitively supplied in all geographic markets. The Applicants' sweeping characterization of the special access market as either competitive[65] or adequately regulated should be afforded minimal weight.[66]

Finally, the Applicants fail to rebut Rate Counsel's concern that the transaction would silence an important regulatory voice,[67] and Rate Counsel's concern about AT&T's well-established track record of buying out the opposition.[68]

E. Roaming

Shifting additional roaming oversight burdens to the FCC *after the merger occurs* is a poor substitute for addressing market imperfections now.

Applicants do not address adequately concerns that were raised about AT&T's post-merger roaming behavior. Among other things, Applicants assert that "any attempts by AT&T to impose unreasonable roaming terms or conditions or otherwise to deny roaming agreements might spur additional action by the Commission that is costly and burdensome to AT&T."[69] However, any anticompetitive behavior by AT&T would require costly and burdensome effort by AT&T's rivals to submit complaints to the FCC. Pending the resolution of such complaints, competition would be harmed. Instead, it is far preferable to identify and to address roaming

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65 / Casto Declaration, at para. 14 (referring to "intensely competitive environment").

66 / Certainly a statement such as "[t]he price of TDM special access facilities also *appears* to be falling in recent years" is hardly persuasive evidence of a competitive market. Willig/Orszag/Ezrielev Reply Declaration, at footnote 158, emphasis added.

67 / Rate Counsel Petition, at 41-44.

68 / *In the Matter of SBC Communications Corp. and AT&T Corp, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-65, *Memorandum Opinion and Order*, rel. November 17, 2005 ("SBC/AT&T Merger Order").

69 / Willig/Orszag/Ezrielev Reply Declaration, at para. 13.

issues adequately as part of the merger proceeding. Before, the FCC considers the merits of the proposed transaction, it should *first* review all roaming agreements.[70]

AT&T also is not persuasive in its argument that because roaming sales account for a small portion of its total revenues, it lacks an incentive to raise roaming rates.[71] Even if increasing roaming rates would not significantly raise AT&T's revenues, roaming rate increases could nonetheless inhibit competitors by raising their costs of supply.

Moreover, the purported "incentive for the merged firm to *lower* prices"[72] as a result of the elimination of the double marginalization caused by roaming arrangements that now exist between AT&T and T-Mobile is not compelling, because there is little evidence to suggest that the wireless market is sufficiently competitive to cause AT&T, post-merger, to flow through its roaming-related savings.

Rather than rely on theoretical assurances, the FCC should require AT&T to have roaming agreements in place before the merger is approved and those agreements should be reviewed by the FCC as part of the merger proceeding.

F. Net Neutrality

The Applicants fail to address adequately Rate Counsel's well-founded concerns about the exacerbating effect of the proposed transaction on net neutrality.[73] If the transaction "poses

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70 / *See*, by contrast, discussion in Declaration of William W. Hague (Executive Vice President – International, Alliances and Integration for AT&T Mobility and Consumer Markets for AT&T Mobility Services LLC) ("Hague Declaration").

71 / Willig/Orszag/Ezrielev Reply Declaration, at para. 71.

72 / Carlton/Shampine/Sider Reply Declaration, at para. 143 (emphasis in original).

73 / Joint Opposition, at 200-206, citing among others, Rate Counsel's Petition, at footnote 395.

no conceivable threat"[74] to net neutrality, why then do the Applicants vociferously object to conditions that would merely memorialize the conduct they assert they would exhibit post-merger? The Applicants assert that "[i]f the combined company were to impair the ability of third parties to provide complementary applications and content over its network, it would simply drive consumers into the hands of wireless competitors that do *not* degrade their platforms that way."[75] This is not a compelling argument because competitors may not always be present to allow such migration, and, furthermore, harm may be irrevocable. The proposed transaction would provide AT&T with substantially greater gatekeeper control over an increasingly important form of technology. Existing net neutrality rules, which fail to create parity between wireline and wireless services, are inadequate to ensure that consumers and innovators can make their own choices about applications, services, launching new technologies, and communicating. AT&T's statement that "neither AT&T nor T-Mobile USA is a major provider of applications or content"[76] is hardly reassuring. One of the industry events that triggered the FCC's closer scrutiny of net neutrality was Verizon Wireless' attempt to thwart NARAL from text messaging.[77]

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74 / Joint Opposition, at 202.

75 / *Id.*, at 204, emphasis in original.

76 / *Id.*, at 202.

77 / Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," The Brooking Institution, Washington DC, September 21, 2009, at 3. He stated specifically: "Notwithstanding its unparalleled record of success, today the free and open Internet faces emerging and substantial challenges. We've already seen some clear examples of deviations from the Internet's historic openness. We have witnessed certain broadband providers unilaterally block access to VoIP applications (phone calls delivered over data networks) and implement technical measures that degrade the performance of peer-to-peer software distributing lawful content. We have even seen at least one service provider deny users access to political content. And as many members of the Internet community and key Congressional leaders have noted, there are compelling reasons to be concerned about the future of

G. Universal Service

Applicants oppose Rate Counsel's USF concerns and recommendations.[78] It is simply not fathomable that AT&T, a company with a net income of $20 billion,[79] requires high cost support to offer affordable service. The following table, based on the data presented in Table 7 of Rate Counsel's Petition, presents the universal service support that AT&T receives separately as a competitive eligible telecommunications carrier ("CETC") and as an incumbent wireline carrier.

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openness." This would appear to refer to Verizon Wireless' block of text messages from NARAL in 2007. See Adam Liptak, "Verizon Blocks Message of Abortion Rights Group," *The New York Times*, September 27, 2007.

[78] / Joint Opposition, at 222-223, citing, among others, New Jersey Rate Counsel Petition.

[79] / AT&T Inc. 2010 Annual Report, at 39. AT&T reported $124 billion in revenues and a net income of $20 billion in 2010.

AT&T Projected High Cost Support for Q3 2011		
State	**Study Area Name**	**Total High Cost Support**
	Cost Incumbent ETC	
MS	SO CENTRAL BELL-MS	$18,970,059
AL	SO CENTRAL BELL-AL	$5,835,507
GA	SOUTHERN BELL-GA	$3,952,485
KY	SO CENTRAL BELL-KY	$3,310,410
Fl	SOUTHERN BELL-FL	$2,212,821
LA	SO CENTRAL BELL-LA	$2,202,390
CA	PACIFIC BELL	$2,018,676
TN	SO. CENTRAL BELL -TN	$1,614,474
NC	SOUTHERN BELL-NC	$1,037,484
SC	SOUTHERN BELL-SC	$1,007,088
NV	NEVADA BELL	$943,155
OK	SOUTHWESTERN BELL-OK	$532,533
KS	SOUTHWESTERN BELL-KS	$173,001
CT	SOUTHERN NEW ENGLAND	$119,844
AR	SOUTHWESTERN BELL-AR	$53,436
IL	ILLINOIS BELL TEL CO	$0
IN	INDIANA BELL TEL CO	$0
MI	MICHIGAN BELL TEL CO	$0
MO	SOUTHWESTERN BELL-MO	$0
OH	OHIO BELL TEL CO	$0
TX	SOUTHWESTERN BELL-TX	$0
WI	WISCONSIN BELL	$0
	Cost Incumbent Subtotal	$43,983,363
	Competitive ETC	
PR	CINGULAR WIRELESS	$8,510,145
WA	CINGULAR WIRELESS, LLC D/B/A AT&T WIRELESS (WA)	$5,288,151
OR	CINGULAR WIRELESS (OR)	$2,630,649
AR	CINGULAR WIRELESS (AR)	$2,026,788
AL	AT&T WIRELESS (AL)	$1,480,395
MI	NEW CINGULAR WIRELESS PCS, LLC, D/B/A AT&T MOBILITY	$1,424,805
WI	NEW CINGULAR WIRELESS PCS, LLC (AT&T MOBILITY)	$719,334
VA	CINGULAR WIRELESS (VA)	$670,911
NY	AT&T COMMUNICATIONS OF N.Y. INC.	$20,751
CA	AT&T	$16,743
	CETC Subtotal	$22,788,672
	AT&T Total	**$66,772,035**
	Estimate of Annual High Cost Support (3Q 2011 Amount * 4)	**$267,088,140**

T-Mobile Projected High Cost Support for Q3 2011		
State	**Study Area Name**	**Total High Cost Support**
FL	T-MOBILE SOUTH LLC	$981,615
KY	T-MOBILE CENTRAL LLC AND POWERTEL/MEM	$411,375
NC	T-MOBILE USA, INC.	$136,002
WA	T-MOBILE WEST CORPORATION	$575,259
	T-Mobile Total	**$2,104,251**
	Estimate of Annual High Cost Support (3Q 2011 Amount * 4)	**$8,417,004**

Furthermore, in many instances, AT&T has successfully sought and obtained pricing flexibility for basic local exchange service, and so it is essentially double-dipping, once directly from consumers through increases in local exchange rates and then again directly from consumers through the USF surcharge they must pay to support AT&T's reliance on federal high cost support.

For example, in California, one of the states where AT&T receives high cost support, the Commission granted pricing flexibility in 2008 for residential local exchange service to the four largest incumbent carriers in the state, to take effect in January 2011.[80] AT&T raised its rate for residential basic exchange service in California in January 2011.[81] In Nevada, AT&T's rates for basic network service will be fully deregulated as to price as of January 2012. On January 2011, AT&T had the right to raise its rates for this service by up to $1. Effective January 2011, as soon as it could, ATT raised its rates.[82]

The FCC should certainly request AT&T to identify for each of its 22 "home" states the residential local exchange rate for each of the past three years – certainly where AT&T has been able to raise rates the FCC's presumption should be that it does not require federal USF. Moreover, as Rate Counsel and NASUCA have demonstrated, flawed separations practices overstate the cost allocated to basic local exchange service and therefore result in excessive and unwarranted demands for USF support.

80/ *Order Instituting Rulemaking into the Review of the California High Cost Fund B Program,* California Public Utilities Commission Rulemaking 06-06-028, *Decision Adopting Phased Transition Plan for Pricing Basic Telephone Service, D. 08-09-042*, issued September 24, 2008, at Ordering Paragraph 4.

81 / AT&T Advice Letter No. 38685 submitted to the Public Utilities Commission of the State of California, January 03, 2011, U 1001 C (revising Schedule Cal.P.U.C. No. 5.2 Local Exchange Service, 5.2.2 Residence Service).

82 / Nevada Bell Telephone Company d/b/a AT&T Nevada and AT&T Wholesale Tariff PUCN No. A, A5. Exchange Service, Seventeenth Revised Page 16, effective January 3, 2011.

With an anticipated $39 billion in synergies, the Applicants certainly should not need to draw funds from the USF. However, even if the Applicants were to agree to phase out their CETC support (as did Verizon Wireless[83]), and even all their high cost support, the merger would still not be in the public interest.

III. CONCLUSION

The Commission must balance, among other things, the purported gains in efficiency that the proposed transaction would yield with the undermining of competition. On balance, the Applicants have failed to demonstrate that the proposed transaction is in the public interest and have not provided the information necessary to show that "the transaction is likely to benefit consumers."[84] The Applicants' Opposition is replete with promises of benefits for consumers yet while incentives exist to flow through the synergies to shareholders, there are not commensurate incentives to flow them through to consumers. Rate Counsel urges the Commission to deny the proposed transaction for the reasons set forth in its Petition and in this reply to the Applicants' Opposition. Rate Counsel reserves the right to supplement this Petition based on its more complete review of the Applicants' responses to the FCC's information requests.

83 / *Verizon/AllTel Order*, at para. 196.

84 / Carlton/Shampine/Sider Reply Declaration, at para. 89.

Respectfully submitted,

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Economic Consultants:
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June 20, 2011

Attachment A

DECLARATION UNDER PENALTY OF PERJURY

I, Susan M. Baldwin, hereby state the following:

1. I am an economic consultant retained by the New Jersey Division of Rate Counsel.

2. I have read the forgoing "Reply to Opposition." With the exception of those facts of which official notice can be taken, all facts set forth herein are true and correct to the best of my knowledge, information, and belief.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 20th day June, 2011.

Susan M. Baldwin

Susan M. Baldwin

Attachment B

DECLARATION UNDER PENALTY OF PERJURY

I, Sarah M. Bosley, hereby state the following:

1. I am an economic consultant retained by the New Jersey Division of Rate Counsel.

2. I have read the forgoing "Reply to Opposition." With the exception of those facts of which official notice can be taken, all facts set forth herein are true and correct to the best of my knowledge, information, and belief.

I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 20th day June, 2011.

Sarah M. Bosley

Sarah M. Bosley